SOME PROBLEMS OF INTERNATIONAL LAW.*

When Hugo Grotius published his great work on International Law he entitled it, "Concerning the Law of Peace and War." That obvious division of this great subject continues after the lapse of nearly three centuries.

"The law of war," says Professor Holland, "as is well known, consists of two great chapters, dealing respectively with the relations of one belligerent to the other and with the relations of each belligerent to neutrals."[1] He goes on to show that the former has been discussed for at least six centuries, not to mention classical antiquity. The latter is comparatively modern, dating, as a separate subject, only from the eighteenth century, "though it has already come far to surpass in complexity and importance, the law of belligerency."

It is with some problems in this surpassing branch of the law of war—"the relations of each belligerent to neutrals"—that we wish to deal.

The Treatment of Neutral Blockade Runners.

In discussing in print during the last year, the law of blockade, the writer said that while "the older writers approved of the corporal punishment of the blockade runner" yet "This is now wholly obsolete and a confiscation of the ship, and by the rule of infection, of any cargo belonging to the ship owner, and of any portion of the cargo belonging to an owner cognizant of the blockade or who makes the master his agent, is the sole punishment."[2]

A very eminent and gifted English judge, whose name has for two generations been especially and most honorably identified with public law—Sir Walter Phillimore—by letter, courteously discussing the proposition, suggested to the writer that the rule could hardly be considered as settled; that it must be held at least in doubt. Sir Walter cited the practice of the

* A paper read before the Section of International Law, Department of Jurisprudence, in the International Congress of Arts and Sciences at St. Louis, U. S. A., September 22, 1904.

1. Studies in International Law, by T. E. Holland (Oxford 1898), p. 113.

2. *Yale Law Journal*,, April, 1903.

United States in the war with the Confederacy, and especially the imprisonment of the late Sir William Allan, M. P., and his published reminiscences of the same. Sir William, by birth a Scotchman, lived for years in the United States, but returned to his native country and was later captured by a United States cruiser in Savannah Harbor while serving as chief engineer on a vessel engaged in running the blockade. He was held in prison for six weeks, until he bribed a sentry to take a letter to Lord Lyons, British Minister at Washington, and was then released on parole.[3]

Unfortunately, I have been unable to find Sir William's published reminiscences. Neither is the State Department, nor the Navy Department able to refer me to the facts in the case, nor has the incident been observed in a very extended examinaion of the printed volumes containing the history of the Federal and Confederate navies. However, Sir Walter quotes to me a letter from Sir William, written just before the latter's death in December last:

"The U. S. authorities did imprison men taken in blockade running. Our vessel ("Diamond") was taken to Washington. We were turned over from the naval to the military authorities there, . . . marched to the Provost Marshal's quarters. Answered our names there, then our commitments to the old Capitol Prison were made out."

There they were "quartered with prisoners and had hard usage." Eventually he was paroled out and given a written "parole" describing him as a prisoner of state, which parole he retained through life.

It must be freely admitted that owing to unfamiliarity with international law, and to the suspension, as a war measure, of the writ of *habeas corpus*, so that our courts could not intervene, numbers of cases like the above seem to have occurred. That the situation was complicated by the fact that it was a matter of constant controversy, first, as to the neutrality of the ships, often claimed to be Confederate ships, and only colorably sailing under a neutral flag; secondly, as to the nationality of the members of the crew, who were largely British, speaking the same language with the people of the United States, and who had often, like Sir William, lived for years in the United States. The rule excepting from imprisonment applies only to neutrals upon a neutral ship, and not to belligerents, or subjects, or to those operating a vessel of the belligerent government.

3. The *Daily Chronicle*, London, December 29, 1903.

So the commandant of the Philadelphia Navy Yard wrote Acting Rear Admiral Lee, March 31, 1863: "I have disposed of the crews of the captured vessels—foreigners sent on shore, and citizens of the United States confined."[4]

March 24th in the same year, Captain Boggs of the "Sacramento," one of the blockading ships off Wilmington, wrote to the Rear Admiral in command, asking instructions as to the disposition of persons "taken out of vessels seized as a prize for violating the blockade. To send them north in the vessel would require a much larger prize crew than the exigency of the fleet will permit. They are generally a daring set of men, and the compensation to them would be the strongest inducement to attempt a recapture."[5] The rear-admiral instructed him, in reply, to send those known, or for good cause suspected, to be citizens of the United States, north to the commandant of the navy yard to which the vessel conveying them might be bound. "Those against whom no such proof or suspicion is entertained, if they are not needed as witnesses in the adjudication, will be released from the blockading vessel as soon as practicable."[6]

Certain of the crew of the captured British blockade runner "Adeline" were released on signing an engagement not to be again employed in like proceedings. Secretary Wells instructed the flag officer of the blockading squadron that the Secretary of State held this not warranted by public law and that the crew could not be held as prisoners of war and that they were absolved from the obligation.[7]

On July 25, 1863, President Lincoln instructed the Secretary of the Navy as follows:

"You will not in any case detain the crew of a captured neutral vessel or any other subject of a neutral power on board such vessel, as prisoners of war or otherwise, except the small number necessary as witnesses in the prize court."

"NOTE—The practice here forbidden is also charged to exist, which, if true, is disapproved and must cease." The president adds: "What I propose is in strict accordance with international law, while if it do no other good, it will contribute to sustain a considerable portion of the present British Ministry in their places, who, if displaced, are sure to be replaced by others more unfavorable to us.

"Your obedient servant,

"ABRAHAM LINCOLN."

4. Record U. S. and Confed. Navies, Series 1, Vol. 8, p. 643.
5. Official Rec. U. S. and Confed. Navies, Series 1, Vol. 8, p. 625.
6. Official Rec. U. S. and Confed. Navies, Series 1, Vol. 8, p. 804.
7. " " " " " " " " " 12, p. 462.

The right as a reasonable precaution to place the captured crew in irons lest they rise and overpower the prize crew was maintained in an elaborate letter of Secretary Seward to Lord Lyons in 1861.[8]

The crew of the "Emily St. Pierre," taken off Charleston, did retake the ship, gagging and putting in irons the prize officers and crew.[9]

In January, 1864, the Department of State sent to the Secretary of the Navy intercepted correspondence showing that vessels operated by the Confederacy in blockade running were under orders to conceal their nationality, and suggesting that it would be proper to direct that henceforth British blockade runners be detained in custody and not released as heretofore. Secretary Wells ordered accordingly, and countermanded inconsistent orders,[10] but this was in turn revoked by the Secretary of the Navy, May 16, 1864, and full instructions issued in accord with the views of President Lincoln, before expressed,[11] exempting *bona fide* neutrals on neutral ships from treatment as prisoners of war, and holding them "entitled to immediate release."[12]

The modern doctrine that neutral blockade runners on a neutral ship are not subject to bodily punishment is not contravened, it is submitted, by the ultimate practice of the United States in its blockade of the Confederate coast, by all odds the greatest blockade known to history. It is believed that it is sustained by the text-writers generally.[13]

In the second great blockade of the past eighty or ninety years, that of the Cuban coast, the "Instructions of Blockading Vessels and Cruisers" issued by the Secretary of the Navy of the United States in 1898, and prepared by the State Department, expressly declare: "9. The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration."

The whole subject is most admirably reviewed by Calvo. The older practice is shown and that of the United States in the war with the Confederacy, and at the close he justly observes:

8. Official Rec. U. S. and Confed. Navies, Series 1, Vol. 12, p. 407 *et seq.*
9. " " " " " " " " " " " 814.
10. " " " " " " " " " 9, " 285.
11. *Id.*, p. 405.
12. *Id.*, Vol. 10, pp. 60, 61.
13. Gaulaudet on Inter. L. (condensed from Calvo) p. 298; T. J. Lawrence Prin. Inter. L., p. 592; Walker's Inter. L., p. 525; Woolsey Inter. L. (1899), p. 351; Hall's Inter. L. (1904), p. 710; 3. Phillimore's Inter. L., p. 506; *et seq.*

"The usage concerning the non-infliction of bodily punishment on persons guilty of violation of blockade has become uniform enough so that we can consider confiscation of the property captured as now the sole punishment."[14]

The Consul General of the United States at Yokohama, by letter of July 27, 1904, kindly advises me that in the present Russo-Japanese war the Japanese have treated neutrals captured in attempting to run the blockade at Port Arthur in the same way, holding them as witnesses, it might be, but not as prisoners of war. That is, however, not strictly a blockade. The Legation of Japan at Washington, under date of August 13, 1904, advises me of like practice by Japan as to officers and crews of neutral ships recently captured while carrying contraband which is comparable to breach of blockade, and such persons have been treated in the same way by Russia.

The rule as quoted from Calvo, that great and authoritative writer on public law, seems, it is submitted, to meet with continued and universal acquiesence.

Contraband of War.

On the 14th of February, 1904, Russia, by proclamation, announced that in the war with Japan she would treat as contraband, combustibles of all kinds, such as coal, naphtha, alcohol and other like materials. Also all materials for the installation of telegraphs, of telephones or railroads. This proclamation, together with an explanatory instruction of March 6th, also declares contraband anything capable of serving as food or forage for the Japanese army, and especially rice and fish and its different products, beans and their oil.[15] By ordinance of April 26th, cotton was added to the list. Under these declarations and ordinances, Russian war ships have seized neutral vessels bound for Japanese ports and claimed as prize of war articles of the character listed. For instance, they have seized and caused to be condemned a cargo of American flour on a neutral ship not consigned to the Japanese government, or in any way ear-marked for belligerent use except by its destination to a port of Japan.

The doctrine that articles which may serve alike the uses of peace or war are not contraband unless intended for the military uses of a belligerent, rests on two broad principles:

14. Calvo, Le Droit International, Tome 5 Sect. 2899.

15. Revue Générale de Droit International Public, Mai et Juin, Documents p. 12, *et seq.*

First. That neutrals under modern usage cannot be hindered in their general right to trade in innocent articles of commerce with belligerents except by an actual blockade, never by a proclamation.

Secondly. International law forbids a belligerent to make war upon the civil or noncombatant population of its opponent, and, as Hall says: "Hence seizure of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population."[16]

The claim of Russia has been at once controverted. The Department of State of the United States in a communication to the Ambassadors of the United States of June 10th, took the ground that articles of double use (*ancipitis usus*) are contraband if they are destined for the military uses of a belligerent. It points out that the principle of the Russian declaration "might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent states of all articles which could be finally converted to military use," and adds that such principles "would not appear to be in accord with the reasonable and lawful rights of a neutral commerce." Queen Elizabeth would not allow the Poles and Danes to furnish Spain with provisions, alleging that by the rules of war "it is lawful to reduce an army by famine."[17] But the present government of England has expressed its accord with the views of Secretary Hay by an official note of protest, dated August 1st, against the claim that food is absolutely contraband.[18] Lord Lansdowne, in the Lords August 11th, said that the Russian declaration "greatly amplified the definition of contraband, including much England regarded as innocent. England would not consider herself bound to recognize as valid the position of any prize court which violated the recognized international law." And Mr. Balfour, in the Commons on the same day, said as to the doctrine that a belligerent could draw up a list of articles it would regard as contraband and that prize courts must decide accordingly: "If that doctrine were accepted without reservation, neutrals would be at a serious disadvantage." August 25th, in reply to the Shipping Deputation, Mr. Balfour said there was no possibility of Great Britain receding, inasmuch as she

16. Hall's Inter. L. (5th ed. 1904) p. 656.

17. Taylor's Inter. L. p. 736; Grotius, Droit des Gens, III, sec. 112, 117 and note to sec. 112.

18. *Boston Evening Transcript*, Aug. 9, 1904.

knew she stood "on the basis of all recognized international law to be found in all the text-books, and in accordance with the general practice of civilized nations."

The English view, and it is believed it is the view of the world, is well put by the *Law Times* of London.[19] It declares "the position of Russia as to contraband cannot be accepted for a moment by Great Britain," and says the point is well summed up by the London *Times* in a leading article: "To entitle a belligerent to treat goods as contraband, there must be a fair presumption that they are intended for warlike use, and such presumption does not arise from the mere fact that they are consigned to a belligerent port. In other words, non-blockaded ports should be open to the legitimate trade of neutrals and belligerents who . . . have not the power to establish an effective blockade cannot be suffered to attain the object of such a blockade by an . . . extension of the definition of contraband."

At least since the declaration of Paris of 1856, a paper blockade is of no legal force, and a blockade to be recognized by the law of nations must be "maintained by a force sufficient really to prevent access to the coast of the enemy."[20] This immensely increased the security of neutral commerce and ought not, by the device of declaring an extension of the list of contraband articles, to be done away at any time by any belligerent. The Russian declaration which seeks to treat as contraband substantially all fuel and food, and the staple from which clothing is made, would certainly have this effect if enforced, and the most objectionable harrying of neutral commerce and deprivation of noncombatant belligerents would be liable to follow. That this is no small matter to neutral trade is shown by a very simple consideration of the facts. If we regard the excessive number of two or even three millions of persons as engaged in or by location or otherwise infected by the warlike operations of Japan,[21] then neutral ships cannot carry supplies of food or fuel or clothing to those three millions without liability to seizure, but they may still carry such sup-

19. *Law Times*, Aug. 13, 1904, p. 330.

20. Wheaton's Inter. L., 4th Eng. Ed. 1904, p. 691. See this also declared in Russian Declaration of Feb. 14, 1904, "Le blocus, pour être obligatoire, doit être effectif."

21. The entire number of persons in the Army and Navy of Japan, including reserve and landwehr, as appears by the Statesman's Year Book of 1904, page 864, was 667,362.

plies with entire immunity to some forty-two millions of Japanese, constituting the civil population. The extension by the terms of the Russian proclamation is of a limitation, lawful as to one-fifteenth of the people, to the whole people, and it seems an unwarranted invasion of the plain rights of neutrals to trade in these great staples with forty-two millions of people.

It is certainly customary for belligerents to announce what articles they will treat as contraband, and the Institute of International Law resolved in 1877 that belligerent governments should determine this in advance on the occasion of each war,[22] and Prince Bismarck so stated in reply to a complaint of Hamburg merchants; but no substantial alteration of the rules of international law can be so made.

If a belligerent, commanding the sea, can thus paralyze the neutral transport of food, fuel and the staples of clothing, the suffering and death inflicted on the millions of noncombatants in such island nations as Great Britain or Japan are appalling and quite unwarranted by public law, and the blow to neutral commerce is utterly destructive.

Considering the greatly improved facilities for inland transit, the test of noxious or not according to the character of the port of consignment, may require modification, but such articles are, by the great weight of authority and practice, not, as Russia would make them, absolutely contraband, but conditionally so, if intended for warlike use.

So late as December, 1884, Russia, at the Congo Conference, declared that she would not regard coal as contraband,[23] and food stuffs were not in her list of contraband in 1900.[24]

His Excellency, Count Cassini, the Ambassador of the Tsar at Washington, on the 15th of September, kindly called my attention to the fact that: "As to the question of one of the belligerents declaring absolute contraband goods, not generally recognized as such, it cannot be regarded as something quite unusual. During the Franco-Chinese war for instance, the French government declared rice absolutely contraband without consideration to its use, which declaration was left unprotested by any neutral power."

With deference it is submitted that the action of France was in that case promptly protested by England and that Lord Granville gave notice that Great Britain would not consider

22. Hall's Inter. L., 5th Ed. 1894, p. 653; Annuaire for 1878, p. 112.
23. Lawrence's War and Neutrality in the Far East, p. 158.
24. *Id.*, p. 166.

herself bound by a decision of any prize court in support of the claim of France and no seizure of rice was in fact made.[25]

Supplies of American canned meats bound for Port Arthur and Vladivostock were, at the opening of the war, seized by the Japanese, but they were plainly contraband as destined for the use of the enemy's armed force.[26]

As Dr. Lawrence shows, England imports about four-fifths of the wheat and flour she consumes, and as he says, "The value of our food trade to other nations secures that we shall receive powerful assistance in our efforts to keep it open. It is a matter of life and death for us to prevent any change in international law which shall make the food of the civilian population undoubtedly contraband and if arguments and protests will not do it, force must."[26]

The United States is a great exporter of cotton (she produces about two-thirds of the world's supply) and of food products. About one-half of her population is directly engaged in agriculture, or constitutes the households of those who are so engaged. As a result, no government can maintain itself in that republic which does not use all possible efforts to keep open this foreign trade in field products.

Against earnest and concurrent action on the part of these two powers it would seem strange if Russia should successfully carry out her plan for extending the definition of contraband, and so turning back the happy progress of neutral right. In so far as condemnations have already taken place, they will undoubtedly be the source of claims for damages which will not be easily satisfied.

The fact that cotton was declared contraband by the United States in its war with the Confederacy seems hardly in point, as cotton was then substantially a government monopoly in the Confederacy and almost its only source of revenue.[27] Cotton and its seed are the most considerable item in the imports of Japan, being almost twice as great again in value as sugar, the second article in value in the list.

The whole record as to claims and rulings as to contraband is singularly confused and conflicting, but the claim advanced by Secretary Hay seems so clearly within the practice and the weight of authority of the past half century that it is hoped it

25. Hall's Inter. L., 1904, pp. 662-663; Lawrence's War and Neutrality in the Far East, p. 164; Wheaton's Inter. L., 4th Eng. Ed. 1904, p. 672.

26. Lawrence's War and Neutrality in the Far East, p. 167.

27. Lawrence's War and Neutrality in the Far East, p. 171.

may prevail. Neutral rights are the rights of the vast majority, and they should not be lightly prejudiced for those of the belligerents, who are always a small minority. The disturbance to trade, moreover, caused by a state of belligerency between any two maritime nations is now world-wide. Steam and electricity have made us all near neighbors and exactly as the peace and order of a closely-settled urban community must be kept by far more stringent regulations than that of a community of scattered shepherds and farmers, just so the peace and security of the vastly increased and greatly more connected and interwoven commerce of the modern seas must be preserved by correspondingly adequate rules.

The St. Petersburg dispatches of September 12th seem to intimate that Russia, upon the advice of the commission of eminent persons appointed by her to consider this matter, is inclined to modify her declaration as to absolute and conditional contraband in substantial accord with the American and British notes, except as to cotton, and this is confirmed by those of the 19th. The action is received with very wide satisfaction, and, it is believed, is in accord with the peaceful and beneficent sentiment of the world. Russia is to be congratulated upon the wisdom and humanity of this action, and Secretary Hay upon his successful protest against what he well characterized as "a declaration of war against commerce of every description between the people of a neutral and those of a belligerent state."

Belligerent Act in a Neutral Harbor.*

The seizure of a Russian vessel of war by the Japanese in the Chinese harbor of Chefoo on August 12th, involves most grave questions of international law. The Russian vessel was pursued by Japanese destroyers, but escaped from them in the night. They later found her in the neutral harbor. The Japanese vessels waited outside the port. The Russian failed to come out. The Japanese commander, anticipating his escape by night and a possible attack on merchantmen, entered the port with two destroyers. It is claimed the Russian had been in port twenty-seven hours, and was not yet completely disarmed. A Japanese officer with an armed forced was sent on board in the night—the hour was three A. M.—with a message that the Japanese expected her to leave by dawn or to surrender. The

* A reply to this discussion was printed by Mr. K. K. Kawakami, attached to the Imperial Japanese Commission at St. Louis, in the *Japanese-American Commercial Weekly* of September 4, 1904.

Russian commander refused and was overheard directing that the ship be blown up. At the same time he seized the Japanese officer and threw him overboard, falling with him; and the Japanese interpreter was thrown overboard. The forward magazine exploded, killing and injuring several. The Japanese, being armed and the Russians disarmed, the former prevailed in the mêlée and took possession of the vessel and removed her from the harbor. The Japanese loss, due to the explosion, was one killed, four mortally wounded and nine others injured. Admiral Alexieff informed the Tsar that the vessel was disarmed the day before, according to arrangements with the Chinese officials. The captain and most of her officers and crew swam ashore and reported that the Japanese fired on them as they fled. The Russian captain reports that he had disarmed the ship and, having no arms to resist what he calls a piratical attack in a neutral harbor, ordered the ship blown up.

Admiral Alexieff says the Russians were conferring with the Chinese officials as to a temporary stay to repair the ship's engines, and had given up to the Chinese officials the breech blocks of the guns and rifles and had lowered the ensign and pennant.[28]

Russia earnestly protested at Pekin against this violation of a Chinese port. Japan retained the vessel and justified the seizure on several grounds, claiming that the Russian ship was not effectively disarmed; that her continuance after the lapse of twenty-four hours in the harbor was itself a violation of the neutrality of China and so absolved Japan; that the visit was to ascertain whether or not the ship was in fact disarmed adequately and whether she had just claim to remain for repairs and to demand her departure otherwise, and that the Russians began hostilities and thus justified the Japanese in the capture; that the weakness of China in enforcing her neutrality and the nearness of the port to the seat of war all excused the transaction.

It is respectfully submitted that none of these can be accepted as justifying the capture without suffering serious impairment of the sanctity, the peace and order of neutral harbors and encouraging a painful retrogression in the public law applicable.

As Wheaton says, Bynkershoek alone, of writers of authority, allows the seizure of a vessel pursued into neutral waters, and even he admits he has never seen this doctrine in any but the

28. See *London Times* (Weekly Ed.) Aug. 19, 1904, p. 532.

Dutch writers.[29] Mr. John Bassett Moore shows that Bynkershoek's doctrine as to right of pursuit is almost unanimously condemned, collecting the authorities upon the subject,[30] and he also shows that in 1806 President Madison so held in protesting against the destruction of a French ship "L'Impétueux," disabled by a gale and destroyed by the "Melampus" and two other British ships on the coast of North Carolina. The present was, moreover, hardly a case of fresh pursuit, the Russian vessel having eluded her pursuers and having been later found in the Chinese port.

The practice of powerful belligerents, and especially England, was formerly to pay little, if any, attention to the sanctity of a neutral port, yet the practice seems never to have been deemed lawful.

Here are some of the old precedents involving hostile meetings of war vessels in neutral waters. During the second Punic war Scipio, with two Roman galleys, entered the port of Syphax, King of Numidia, to seek his alliance. There he found Hasdrubal upon a like errand with seven Carthaginian galleys, but they "durst not attack him in the King's haven."[31] The Venetians and Genoese being at war, their fleets met in the harbor of Tyre, "and would have engaged in the very haven but were interdicted by the Governor," and therefore went to sea and fought in the open.[32]

In 1604, James the First of England forbade acts of belligerency in certain waters near the English coast; but in 1605 the Dutch and Spanish fleets fought in Dover harbor. The English castle was silent until the victorious Dutch bound their prisoners two by two and threw them into the sea; then at last the castle battery fired upon the inhuman victors.[33] England here tardily resisted a breach of the neutrality of a British port. However, a year later, the Dutch East India fleet was attacked by the British in Bergen harbor. The governor of the town fired upon the attacking fleet.[34]

Four French ships of war which fled to Lagos after conflict with the English off Cadiz, in 1759, were destroyed in that harbor by the English. Portugal made complaint to England.

29. Wheaton's Inter. L., Sec. 429 (4th ed., Eng.).

30. Moore's Hist. Internat. Arb., 1120.

31. Moore's International Arbitration, p. 1116, quoting the incident from Livy.

32. *Id.*, p. 1117, quoting Molloy "De Jure Maritimo" (5th ed.), p. 12.

33. Walker's Inter. L., p. 169-70; Grotius' Hist. XIV, p. 794.

34. Vatt. Bk. III, Ch. VII, Sec. 132.

Pitt was civil and an apology was duly made by the Earl of Kinoul as special Ambassador Extraordinary, who promised that the British would be more careful in the future, but there was no restitution or compensation.[35]

Phillimore declares this "a clear and unquestionable violation of the neutral rights of Portugal, and it was one of the causes of war by France against Portugal.[36]

In 1781 an English squadron in Porto Praya in the Cape Verde Islands, was attacked by a French fleet. The Portugese fort resisted the attack and no prizes were taken. The French government approved the attack, as Ortolan says, perhaps in retaliation for the action at Lagos.[37]

The French frigate "Modeste" was captured by the English in the harbor of Genoa in 1793. There was neither apology nor restitution.[38]

In the war of 1812, the United States frigate "Essex," at anchor and dismasted in Valparaiso harbor, was attacked and captured by two British ships. The "Levant," a prize of the United States frigate "Constitution," was chased into Porto Praya and there captured while at anchor by vessels from the British fleet.[39]

The American privateer "General Armstrong," a brig of seven guns, was attacked and destroyed by a British squadron of one hundred and thirty guns in the harbor of Fayal in 1814.[40] The resistance was most gallant and assaults were repeatedly repulsed with great loss of life. The Portugese governor interposed with the English commander to obtain a cessation of hostilities, but the latter claimed that the "Armstrong" had fired upon the English boats without cause and that he would take possession of the privateer in consequence, saying that if the Portugese interfered he would treat the castle and island as enemies. It appeared that at evening the long boats of the British squadron, with a large force, apparently armed, outnumbering the crew of the privateer, approached so as to touch her stern with a boat hook. They were warned off, and not desisting, were fired on with fatal results, and returned the fire. The English commander claimed that he intended to reconnoitre the privateer merely, and to observe the neutrality of the port.

35. Dana's Notes to Wheaton, Sec. 430; Moore's Inter. Arb., p. 1127.
36. 3 Phillimore's Inter. L., Sec. 373.
37. Moore's Hist. Inter. Arb., p. 1127; Dip. de La Mer, II, 320.
38. Hall's Inter. L. (ed. of 1904), p. 602.
39. Dana's Notes to Wheaton, Sec. 430.
40. Wharton's Dig. 604; Snow's Cases Inter. L., p. 396.

The circumstances were such that the Americans thought themselves justified in taking the approach as an attack and attempted boarding, and in resisting accordingly. The vessel lay during most of the affray within a half-pistol shot of the castle. Some buildings were burned and persons were killed upon the land by the British cannonade, well illustrating the results of such a practice.

This was the foundation of a claim against Portugal by the United States for failing to keep the peace of the port. On a reference to Louis Napoleon, President of the French Republic, as arbiter, he finally held, in 1852, a few days before he assumed the imperial dignity, against the claim, on the ground that the Americans did not apply for protection to the Portugese authorities in time, and that they fired first upon the British boats as they approached in the night. This case has been cited as the principal case supporting the conduct of the Japanese at Chefoo.

Dana says that the "decision was not satisfactory to the United States Government, as they did not consider the fact on which it rested as established in proof." He thinks the rule should be confined to cases where the vessel "makes a fair choice to take the chances of a combat rather than to appeal to neutral protection."[41]

Lawrence thinks the doctrine of the decision has been fully accepted by British publicists, while American jurists have been disposed to deny or qualify it, but he reaches the conclusion that the side which in a neutral harbor fights purely in self-defense can hardly on that account forfeit the right to redress.[42]

The rule that the belligerent captured in a neutral port cannot recover compensation from the neutral power, unless he demanded protection, and there was failure to afford it, is by no means an indication that the neutral may not demand satisfaction for the invasion of its sovereignty without any such circumstances. The basis of recovery is the negligence of the neutral in one case, but the basis of recovery in the other is the trespass of the offending belligerent.

Mr. Justice Story, a person quite as extensively versed in public law as Napoleon the Third, considered that a belligerent attacked in neutral territory is justified in using force in self-defense.[43]

41. Dana's notes to Wheaton, Sec. 430.

42. T. J. Lawrence's Inter. L., p. 540.

43. Hall's Inter. L. (ed. of 1904), p. 625, and note citing "The Anne," 3 Wheat. 447. See also T. J. Lawrence Prin. Inter. L., p. 540.

It is impossible that international law should be so divorced from the law of nature and all municipal law as to hold otherwise, and in the private law of self-defense one may always justify upon the appearance of necessity.

It is believed that later practice and decisions in no way warrant the invasion of a neutral port even to seize or attack a hostile cruiser harboring there. Ortolan long since, while strongly supporting the exterritoriality of ships of war, yet declared that if the vessel of war in territorial waters undertakes to commit any acts of aggression or hostility or violence, it is the right of all nations to immediately take all the measures and employ all the means necessary for a legitimate defense.[44] It is literally defense against a hostile invasion.

The more recent precedents are as follows: Near the opening of the Franco-Prussian war a French ship, after an unsuccessful combat with a German ship off the harbor of Havana, escaped into the harbor. The German vessel respected the neutrality of the Spanish port and did not further molest the French ship which remained at Havana until the close of the war.[45]

The United States warship "Wachusett," in 1864, attacked and captured the Confederate cruiser "Florida" in the harbor of Bahia and towed her to sea. In that case, also, there was resistance, and shots were exchanged and three men were injured on the attacking vessel.[46] She was pursued by a Brazilian man-of-war, but escaped by superior speed. Although feeling against vessels of the class of the "Florida" and against countries harboring them was most intense, yet the act was repudiated wholly by the United States, the commander of the Federal vessel was court-martialed, the consul, who had advised him, dismissed, and the Supreme Court held that Brazil was justified by the law of nations in demanding the return of the captured vessel, and proper redress otherwise, and that the captors acquired no rights.[47]

In like manner, in the case of the American steamer "Chesapeake, which was, it was claimed, piratically seized on a voyage between New York and Portland in 1863 by certain alleged Confederate partisans, who took passage on her in New York, she having been pursued by a warship of the United States into Nova Scotian waters and there seized, and two men on board

44. Diplomatie de la Mer. 9.218.
45. *Harper's Weekly*, Aug. 27, 1904, p. 1309.
46. Maclay's Hist. of the Navy, Vol. 2, p. 557.
47. "The Florida," 101 U. S. 37; Hall's Inter. L. (ed. 1904), p. 620.

and one of the leaders of the partisans, on a neighboring vessel, taken into custody. The vessel and the men were surrendered by the United States and an apology made for violating British territory.[48]

Dispatches from Buenos Ayres of August 28, 1904, show that relations between Argentina and Uruguay have become strained through an attack by Uruguay on an insurrectionary force directed against her, but in Argentine waters.

The cases holding the seizures of merchant vessels in neutral waters void are too numerous to collate and are therefore omitted.

The fact that the Russian ship had remained more than twenty-four hours in the Chinese harbor shows a possible violation of the twenty-four-hour limit adopted by China in her declaration of neutrality, if the Russian ship was not, as claimed, detained for necessary repairs and already disarmed.

The limit of twenty-four hours was one which China could adopt or not in her discretion and therefore could enforce or not.[49] No other power had the right to enter her ports to enforce it. It is usual, but not a legal obligation, for neutral nations to fix such a limit for the stay of belligerent ships of war in their ports. Though such a rule seems in process of formation as a requirement, yet during the present operations, though many have, numerous nations appear not to have announced such a limit.

In the case of a Russian gunboat in the harbor of Shanghai which failed to withdraw on the demand of China, Dr. Lawrence says that Japan "might have given notice to China that she would no longer respect the territorial waters of a state which seemed powerless to defend its neutrality, or she might have claimed reparation for the indulgence shown to her opponent."[50] She did neither, but after long parley the Russian vessel was dismantled. The statement of the rights of Japan seems extreme, and the constant assumption that the twenty-four hours limit is a provision of international law which a belligerent may enforce against any neutral seems wholly unwarranted.

A practice of declaring such limit is wide-spread and growing, but the rule on this subject as stated in the edition of

48. Hall's Inter. L. (ed. 1904), p. 620; Wheaton's Inter. L. (4th ed. Eng.), p. 580.

49. Dana's notes to Wheaton, Sec. 429.

50. War and Neutral. in the Far East, p. 138.

Wheaton published within the year with notes by J. Beresford Atley, is as follows: "The reception or exclusion of belligerent cruisers and their prizes in neutral ports is a matter entirely at the discretion of the neutral government."[51] He shows that the limit of twenty-four hours for the stay of a belligerent ship of war in a neutral harbor is not half a century old and depends on the action of the neutral power in declaring it, and that it is not a settled obligation of international law.

Lawrence thinks the twenty-four-hour regulation admirable and points out that neutrals are bound to treat both belligerents alike, but says the law of nations allows the stay of belligerent vessels in neutral ports, and that we have no right to complain where this regulation is not adopted. He says expressly that the common "assumption that International Law forbids belligerent vessels to enjoy the shelter of neutral ports for more than twenty-four hours at a time . . . is an error, but one so general that those who give expression to it have much excuse."[52]

A neutral state may at will close all its ports to belligerents, and the New York *Nation* says: "Norway and Sweden, we believe, have done so in the present war."[53] It is believed that Norway and Sweden and Denmark have excluded war ships of the two belligerents from a large number of their principal fortified ports, but not from all. Their proclamations of neutrality seem to so provide, and this has been their policy for half a century.[54] They impose the twenty-four-limit in such ports as are left open.

The fact that Japan on September 11th made protest against the Russian auxiliary cruiser "Lena" remaining in San Francisco harbor longer than twenty-four hours brings home the question to the United States Government. The vessel claimed that she was detained for necessary repairs and the United States took steps to ascertain whether or not this was well founded, and enforced very fully its neutral regulations by directing the disarmament of the ship. It is inconceivable that any foreign power could undertake to investigate by force such a question and to determine for itself the facts and thereupon precipitate a naval engagement in San Francisco harbor. It is not conceivable that such a practice could be tolerated by the

51. Wheaton's Inter. L. (4th Eng. ed.), p. 587, note.
52. War and Neutral. in Far East, 120.
53. *The Nation*, Aug. 4, 1904, p. 101.
54. Rev. Gen. de Droit, Pub. Mai-Juin, 1904, pp. 14 and 15 of Documents.

neutral maritime powers. The claim of the Japanese Consul of a right to personally inspect the "Lena" was not admitted by the collector of the port, who held, very justly, that such inspection was the business of the United States authorities alone.[55] A belligerent cannot have the right to police all neutral harbors for the purpose of enforcing regulations imposed by those powers. Any such invasion of territorial jurisdiction upon a disputed question of fact would be lamentable in its results and any rule naturally leading to such consequences should be resisted absolutely on its first appearance.

The *Nation* asks in this connection, why all neutral ports should not be closed except to ships in distress. It may be observed that a neutral state does habitually close its landed territory to the forces of a belligerent, and that a like rule applied habitually to neutral ports would greatly limit naval warfare and tend to check the loss and disturbance which it inflicts on neutral commerce. It would strongly tend to localize war and avoid far-reaching complications. The main objection to it, as has been said, is the overwhelming advantage it would give to great colonial powers like Great Britain, having ports in all parts of the world.

Peace being the normal order of things, as Sir John Macdonell has lately said, the disposition of the past forty years has been that the "interest of neutrals should prevail in conflict with those of belligerents,"[56] and the recrudescence of belligerent sentiment which Sir John reports, must be abated. Commerce, after all, is the great interest and service of the seas, and war is a minor and temporary affair. The greater interest ought not to yield to the less, except under the most direct necessity.

Sinking Neutral Vessels.

The sinking of a neutral ship by a Russian squadron on the ground that she was carrying contraband of war and that it was impossible on account of the weather, lack of coal and the neighborhood of a Japanese fleet, to bring her in for adjudication, has led to wide and unfavorable criticism.

The ship, the "Knight Commander," was alleged to be loaded with a cargo of railroad supplies, intended for belligerent use by Japan. Her papers were preserved, her officers and crew placed in safety and allowed to attend the condemnation

55. *New York Nation*, Sept. 15, 1904.
56. *Nineteenth Century*, July, 1904.

proceedings at Vladivostock. The court there subsequently held such proceedings a basis for condemnation.

The criticism seems to rest on the doctrine often asserted that although a belligerent vessel taken as a prize may be destroyed if it cannot be brought in, yet a neutral vessel so taken must not be destroyed, but if she cannot be brought in, must be allowed to go free, even though carrying contraband.

The contraband articles cannot be taken from the neutral ship for at least two reasons: First, commonly, as in the case of the "Knight Commander's" cargo of railroad supplies, it is physically impossible for the war ships to accommodate them. Secondly, the claim always is, that the ship and her papers and necessary witnesses must be brought into port as a condition for condemning the cargo. Thus, in the Trent affair, where it was claimed that the carrying of Messrs. Mason and Slidell was in the nature of carrying contraband, and that therefore their seizure and removal was warranted, it was successfully answered that until condemned by a proper prize court, a captor has no right to do anything except bring the ship before the court.[57]

This doctrine, that a neutral vessel can never be destroyed before adjudication, seems to rest mainly on the case of the "Felicity,"[58] where Sir W. Scott passed on the subject of an American merchant ship and cargo destroyed by the English cruiser "Endymion" during the war of 1812. The vessel was sailing under British license but mistook her captor for an American warship. She therefore concealed this license. The weather was so boisterous and the vessel so injured that she could not be brought to port, nor could the captor spare a prize crew. She was therefore burned. The court holds, as her license was concealed, she must be treated simply as a belligerent, and that the destruction was legal. It is said, *arguendo* merely, that if she had shown her license she would have been entitled to be treated as a neutral, and Sir William says:

"Where it is neutral the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reason nor precedent to illustrate or support them."

57. Wheaton's Inter. L. (Ed. 1904) Sec. 109b.

58. Dodson's Admiralty, 381.

This remark of an eminent judge seems largely the parent of the rule. It is submitted, with deference, that the rule apparently sought to be enforced by the Russian authorities and recognized by the Vladivostock court, is more just and reasonable—namely, that if, for good and sufficient cause, such neutral prize cannot be brought in, there is no obligation to allow her to go free, to reinforce the enemy with her cargo, but as a rule of necessity, to prevent the delivery of the cargo, she may be destroyed exactly as a belligerent, the crew and papers being preserved and the question of prize or no prize being adjudicated as if she had been brought in. It seems too much to expect the other rule to be observed where the cargo is plainly contraband and important to the enemy. The objection by England to the destruction of this ship, M. de la Peyre declared recently, does not rest on a solid foundation, and that of the United States, he says, is even less permissible since during the war of secession the two parties systematically sank all the prizes.

M. de la Peyre is under a mistake. The Federal cruisers habitually brought in and submitted to the prize courts their captures. No such course was open to the Confederate cruisers, since all the ports of the Confederacy were blockaded and the ports of no other country were open to them for such use.

Captain Semmes of the Confederate cruiser "Alabama" habitually burned his captures,[59] but he seized only vessels belonging to American citizens and carefully avoided neutral ships or cargoes. His practice is therefore no precedent as to the right to destroy a neutral vessel without condemnation.

His situation was, however, such that if he had the full rights of a belligerent it would seem that he had as a matter of necessity the right to destroy contraband of war even without the intervention of a prize court. Suppose an armed British ship, fitted for belligerent use, had been met on her way to a Federal port, evidently designed for sale and likely to be bought by the Federal Government. Would Captain Semmes have been bound by international law to leave her unmolested since he could not bring her into port for condemnation? The suggestion that such is the law because of Sir William Scott's *dictum* and the echo of it by the writers, cannot be concurred in.

It must be admitted that a neutral, carrying contraband, is not exposed by that act alone to condemnation of the ship, but Sir William Scott himself recognized that "the ancient prac-

59. Offic. Records U. S. & Confed. Navies, Vol. 1, where conduct of both navies is set out at length and in detail, with records and correspondence.

tice was otherwise," and said, "it cannot be denied that it was perfectly defensible on every principle of justice."[60] He shows that modern policy has introduced a relaxation on this point, but that circumstances of aggravation or misconduct may revive against the ship the ancient penalty.

Justice Story shows that the penalty is applied to the vessel on account of coöperation "in a meditated fraud upon the belligerents by covering up the voyage under false papers and with a false destination."[61] The whole right of seizure and condemnation of neutral contraband is based, as Kent shows from Vatel, on "the law of necessity" and "the principle of self-defense."[62]

Sir W. Scott held that the penalty for carrying dispatches of a belligerent (certainly a more noxious act), must be the condemnation of the neutral ship, and argues that the confiscation of the dispatches would be ridiculous and says: "It becomes absolutely *necessary*, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle."[63] If the courts of Russia, reasoning as boldly as Sir William, Mr. Justice Story and Chancellor Kent, are allowed to maintain their conclusion from the rules of justice and necessity, their position is by no means untenable.

His Excellency, Count Cassini, the Russian Imperial Ambassador to the United States, on the 15th of September, 1904, by letter, kindly called the writer's attention to the Russian Imperial Order of March 27, 1895, which reads as follows:

"In extreme cases, where the retention of ships is impossible, owing to their bad condition, when they are of small value, in danger of capture by the enemy, when at a great distance from a home port, or when there is danger for the ship which has taken the prize, the commander, upon his responsibility, may burn or sink the captured vessel after previously having taken her crew and, as far as possible, her cargo. Her documents must be preserved and witnesses can be held for the purpose of testimony before the prize court."

His Excellency adds:

"As this last declaration has never been protested by any power, it appears, consequently, that the commander of the Russian man-of-war committed a perfectly lawful act in sinking

60. The "Neutralitet," 3, C. Robinson 295.
61. *Carrington v. Merchts. Ins. Co.*, 8, Peters 495.
62. *Seton v. Low*, 1 Johns. Cases 1.
63. The "Atlanta," 6, C. Robinson 440.

the British steamer 'Knight Commander,' which was undoubtedly carrying contraband of war, as it was proven immediately after her being stopped. This was confirmed later on the trial, when the deposition of the captain was refuted and contradicted by the presented board documents which he supposed to be lost with the ship."

The instructions issued by the Secretary of the Navy of the United States in 1898 to blockading vessels and cruisers, and prepared by the Department of State, strongly resemble those of Russia.

They are as follows:

"28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease or the lack of a prize crew, they may be appraised and sold, and if this cannot be done *they may be destroyed.* The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

It is to be observed that the language is general, applicable to neutral as well as belligerent vessels, and it is believed it in a measure supports the Russian contention.

It is submitted that this rule and the Russian practice are entirely reasonable and in accordance with the necessities of maritime war and that they are, therefore, able to impair the authority of a *dictum* even from so eminent an admiralty judge as Sir W. Scott.

The result of this inadequate discussion of these several problems in international law (a few of the many lately mooted) is a humiliating sense of the uncertainty, confusion and conflict which still attend the maritime rights of neutrals in the time of war. One is forced almost to acquiesce in M. de La Peyre's recent statement, that maritime international law does not exist.[64]

It certainly shows the great necessity of an authoritative international conference to discuss, define and establish the rights and duties of neutral commerce in time of war. Now that the vast and complicated machinery of war is of such desolating destruction, it is more true even than a generation ago, when the late Mr. Lecky so convincingly proclaimed it, that the rich nations are the potent ones in war, as in a ruder age they were not. It is true, too, that the very riches which enable them to

64. Quest. Diplomatiques et Coloniales, Aug. 1, 1904, p. 185.

support, powerfully persuade them to avoid, war. These great commercial powers possess the seas with their beneficent adventures and they must strive to keep the peace on those great highways of all the nations, and the ships that bear the means of life must be considered as of interest and human claim equal and paramount to those designed to inflict death.

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